

**No. PD-0624-20**

IN THE  
TEXAS COURT OF CRIMINAL  
APPEALS

FILED  
COURT OF CRIMINAL APPEALS  
11/17/2020  
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**DALLAS S. CURLEE,  
APPELLANT,**

**v.**

**THE STATE OF TEXAS,  
APPELLEE.**

ON PDR FROM THE THIRTEENTH  
COURT OF APPEALS

**BRIEF FOR THE STATE**

Douglas K. Norman  
State Bar No. 15078900  
Special Prosecutor  
Jackson County District Attorney  
115 W. Main Street, Ste 205  
Edna, Texas 77957  
(361) 782-7170  
douglas.norman@nuecesco.com

Attorney for Appellee

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**NO. PD-0624-20**  
**(Appellate Cause No. 13-19-00237-CR)**

<b>DALLAS S. CURLEE,</b> <b>Petitioner,</b>		<b>IN THE</b>
<b>v.</b>		<b>COURT OF CRIMINAL APPEALS</b>
<b>THE STATE OF TEXAS,</b> <b>Respondent.</b>		<b>OF TEXAS</b>

**BRIEF FOR THE STATE**

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the State of Texas, by and through the District Attorney for Jackson County, and respectfully urges this Court to affirm the judgment of the Thirteenth Court of Appeals in the above named cause for the reasons that follow:

**SUMMARY OF THE ARGUMENT**

Evidence that a playground on the grounds of a church was visible and easily accessible to any child who might pass by, was sufficient to show that it was “open to the public” for purposes of the drug free zone enhancement.

## **ARGUMENT**

### **Consolidated Response to All Grounds**

**The evidence was legally sufficient to prove that the playground in question was “open to the public.”**

Curlee complains by all three of his grounds for review that the State failed to prove the drug free zone enhancement by failing to present evidence that the playground in question was “open to the public.”

#### **I. Statement of Relevant Facts.**

Officer Smejkal testified that the van in which Curlee was found was located less than 600 feet from the First United Methodist Church in Edna (RR vol. 4, p. 84), which included an outdoor playground that Smejkal testified, without objection, was “open to the public,” and around which there was a four-foot fence without locks on the gates. (RR vol. 4, pp. 86-89) Officer Smejkal testified to his belief that the gates were kept unlocked at all times. (RR vol. 4, p. 102) Upon being recalled later at trial, Officer Smejkal testified concerning a number of photographs of the gates to the playground in question, including one gate that clearly could not have been locked. (RR vol. 4, pp. 157-159 ; SX # 34-36)

State’s Exhibits # 18 – 23 show a typical children’s playground, with slides, ladders, a tunnel, and climbing bars, as well as various toys left on the

ground. It further appears to have open and unblocked access to surrounding properties.

## **II. Drug Free Zone Enhancement.**

Ordinarily, punishment for the present third-degree felony, enhanced by a prior conviction, would be subject to the second-degree range of 2-20 years. *See* Tex. Health & Safety Code § 481.115 (a) & (c); Tex. Penal Code § 12.42 (a). However, the drug free zone enhancement applies to raise the minimum period of confinement by five years if the offense was committed within 1,000 feet of a playground that, among other requirements, must have been “open to the public.” Tex. Health & Safety Code § 481.134 (a)(3)(B). The statute specifically provides that:

“Playground” means any outdoor facility that is not on the premises of a school and that:

- (A) is intended for recreation;
- (B) is open to the public; and
- (C) contains three or more play stations intended for the recreation of children, such as slides, swing sets, and teeterboards.

Tex. Health & Safety Code § 481.134 (a)(3).

## **III. Open to the Public.**

Few cases have fleshed out the criteria for being “open to the public” for purposes of the drug free zone enhancement.

In *Ingram v. State*, the Texarkana Court of Appeals concluded that, where there was no direct evidence that a privately-owned park was open to the public, the jury could not reasonably infer that it was “open to the public” for purposes of the drug free zone enhancement. 213 S.W.3d 515, 518–19 (Tex. App.—Texarkana 2007, no pet.).

On the other hand, in *Graves v. State*, the Houston Fourteenth Court of Appeals concluded that the jury could reasonably infer that an area that witnesses described as a “park,” and which was open and accessible from a public street, was “open to the public.” 557 S.W.3d 863, 867 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

It appears at least from *Graves* that the general nature of the place in question (there, a “park”; here, a church playground), coupled with its being open and accessible to the public, may lead to a reasonable inference that it is “open to the public” for purposes of the enhancement.

The jury may use common sense and apply common knowledge, observation, and experience gained in ordinary affairs when drawing inferences from the evidence. See *Acosta v. State*, 429 S.W.3d 621, 625 (Tex. Crim. App. 2014); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

### *A. Open Nature of Churches.*

Concerning the public nature of a church, this Court has said, “We see no valid distinction, insofar as the law of burglary is concerned, between a church, into which the public has consent to enter for the purpose of meditation and prayer, and a place of business, into which the public has consent during business hours to enter for the purpose of transacting business.” *Trevino v. State*, 254 S.W.2d 788, 789 (Tex. Crim. App. 1952) (on rehearing).

Since the earliest times, churches have been a source of charity and good will to the community, and an open playground at a church is surely one means by which that church extends its good will to the community it serves. And, just as the open and accessible sanctuary carries with it an implicit invitation for the public to enter for the purpose of meditation and prayer, an open and accessible playground adjacent to the church with no apparent or posted restrictions carries with it an invitation for children to play there.

In the present case, it is clear from the exhibits that even short little hands can open the gate in question to enter and play. And when such a playground is not locked or otherwise obviously restricted, it is “open” as far as children in the neighborhood are concerned, whether or not they have a formal invitation to play there.

*B. The Attractive Nuisance Doctrine.*

In addition , the State believes that the doctrine of “attractive nuisance” is highly relevant to the status of the children playing on the grounds of the church as invitees, and thus as members of the public implicitly “invited” to use the playground, which in turn must be considered as making that playground “open to the public.” The Texas Supreme Court has explained the “attractive nuisance” doctrine as follows:

However, “when children of tender years [come] upon the premises by virtue of their unusual attractiveness, the legal effect [is] that of an implied invitation to do so. Such child [is] regarded, not as a trespasser, but as being rightfully on the premises.” *Banker v. McLaughlin*, 146 Tex. 434, 208 S.W.2d 843, 847 (1948). This is the doctrine of attractive nuisance. It originally developed in so-called “turntable cases” where young children were injured playing on railroad turntables which seemed especially attractive playgrounds, the dangers of which children did not appreciate. *See, e.g., (Sioux City & Pac.) Railroad Co. v. Stout*, 84 U.S. (17 Wall.) 657, 21 L.Ed. 745 (1873); *Evansich v. Gulf, C. & S.F. R’y*, 57 Tex. 123 (1882).

The doctrine has since been extended to other situations, as we explained in *Banker*:

“The theory of liability under the attractive nuisance doctrine is that, where the owner maintains a device or machinery on his premises of such an unusually attractive nature as to be especially alluring to children of tender years, *he thereby impliedly invites such children to come upon his premises, and, by reason of such invitation, they are relieved* from being classed as trespassers, but are in the attitude of *being rightfully on the premises*. Under such circumstances, the law places upon the owner of such machinery or device the *duty of exercising ordinary care* to keep such machinery in reasonably safe condition for their protection, if the *facts are such as to raise the issue that the owner knew, or in the exercise of ordinary care ought to have known, that such children were likely or would probably be*

attracted by the machinery, and thus be drawn to the premises by such attraction.” (Emphasis ours.)

The “attractive-nuisance”, or so-called turntable doctrine, is applicable to cases involving different dangerous instrumentalities and conditions on the premises.

208 S.W.2d at 847–848. When the attractive nuisance doctrine applies, the owner or occupier of premises owes a trespassing child the same duty as an invitee.

*Texas Utilities Electric Co. V. Timmons*, 947 S.W.2d 191, 193 (Tex. 1997).

While attractive nuisance is a tort law concept, it dips into the same well of societal experience and expectations as the present statutory concept of “open to the public.” And, in the present case, the exhibits and the open chain link fence clearly show that the playground would have been visible and attractive to any child passing by.

### *C. Legislative History.*

When the drug free zone enhancement was being considered by the legislature, a bill analysis explained that “Drug-free zones should be established where we need them most: in areas where children are known to gather, such as schoolyards, public playgrounds, youth centers, and video arcades.” S. Research Ctr., Bill Analysis, Tex. S.B.16, 73rd Leg., R.S. (1993). Accordingly, the emphasis was on places “where children are known to gather.” The State would suggest that the Legislature intended a common-sense interpretation based on where children actually do tend to gather, and not on hyper-technical requirements for explicit permission or posted invitations to gather or play.

*D. “Public Place” and “Open to the Public” in Other Statutes.*

With regard to Penal Code offenses, the Penal Code defines “public place” as “any place to which the public or a substantial group of the public has access.” Tex. Penal Code § 1.07 (a)(40); *see Banda v. State*, 890 S.W.2d 42, 52 (Tex. Crim. App. 1994); *see also Beeman v. Livingston*, 468 S.W.3d 534, 539–40 (Tex. 2015) (“public,” when used as an adjective, means “open and accessible to the public”).

In addition, the term “open to the public” has been used in the Texas burglary statute. A person commits burglary when, among other things, he enters a building not then “open to the public.” Tex. Penal Code § 30.02(1). In a relatively recent burglary case, the Austin Court of Appeals analyzed whether a portion of certain business premises was open to the public based on whether or not it would have been “obvious to adults” or “clear to adults” that the area in question was restricted to employees. *Dominguez v. State*, 363 S.W.3d 926, 933–34 (Tex. App.—Austin 2012, no pet.). Likewise, when coupled with the attractive nuisance doctrine, it would not have been clear or obvious to children that the present church playground was restricted to any particular class or group of children.

Similarly, for purposes of the DWI statute, this Court long ago interpreted “public road or highway” based not on concepts of private property or ownership, but on actual use of the roadway by the public, as follows:

Questions as to the time or manner of dedication, title to the soil, place of location, as within a city, town, or in the country, or questions of private rights and privileges, become ordinarily immaterial upon a trial when the indictment charges that the place of such violation, in a case like this, is upon a public road and highway, and when the testimony of witnesses be without contradiction that such road is open or used for traffic by the public generally. There must of necessity be legislative authority to enact laws to protect the people in their exercise of all public rights, and it would be intolerable to think that when investigating the criminal liability of the drunken driver of an automobile on a roadway, more or greater proof would be required to establish the character of the road, than that it was or is open for the use, or used by the public for traffic. Such being the allegation here, we think the charge of the court correct, and the testimony complained of admissible, and that no error was presented by the refusal of the special charge. We are not writing of a case, nor laying down rules applicable to a case, in which private rights or privileges may be involved from any angle, but of a case in which one user of a road or highway breaks reasonable rules laid down by law for the safety of all other users of such road or highway.

*Nichols v. State*, 49 S.W.2d 783, 784 (Tex. Crim. App. 1932) (citations omitted).

In the same way that the DWI laws protect the safety of all other users of a publicly accessible highway regardless of the niceties of property law, the drug free zone enhancement protects the safety of children on a publicly accessible playground, whether or not they have a technical legal right to be on that playground.

### *E. Criminal Trespass.*

The Texas criminal trespass statute may also be somewhat instructive as to whether a given area is open to the public. It requires, in addition to entry onto another's property without consent, notice that such entry was forbidden, in the form of either (in pertinent part):

- (A) oral or written communication by the owner or someone with apparent authority to act for the owner;
- (B) fencing or other enclosure *obviously designed to exclude intruders* or to contain livestock;
- (C) a sign or signs posted on the property or at the entrance to the building, reasonably likely to come to the attention of intruders, indicating that entry is forbidden;

Tex. Penal Code § 30.05 (b)(2) (emphasis added).

In the present case, the low fencing in question with unlocked gates was not obviously designed to exclude intruders, but clearly served another purpose obvious to any parent who has had to supervise a playing child. It tends to keep the playing child in a defined area where he may be supervised, and prevents him from leaving without some degree of effort and notice to the supervising parent. It also provides the supervising parent with a greater ability to monitor other adults of questionable character who may try to enter the playground while a child or children are playing. In short, the fence serves as a safety device for the children, not as a means of excluding any particular group of them from the playground.

*F. Clearly Private and Restricted Playgrounds.*

The State admits that certain circumstances clearly would compel the conclusion that a given playground was private and not open to the public. In contrast to the present circumstances, a backyard residential playset behind high privacy fencing or a playground in a private gated community with restricted access would probably not qualify as open to the public.

*G. Intent is Not an Issue.*

Curlee in his brief focuses on whether the church in question “intended” its playground to be “open to the public.” Yet, that it not what the State must prove. There is no element of intent involved. Rather, the element that the State must prove is that the playground is in fact open to the public, which is logically controlled not by the subjective intent of church authorities but by the objective circumstances of the playground itself and its surroundings.

*H. Lay Opinion is Sufficient.*

Finally, an argument could also be made that Officer Smejkal’s unobjected to assertion that the playground was open to the public amounted to a sufficient lay opinion to that effect to support the present enhancement. And that, by failing to object to Smejkal’s lack of a basis or qualification for expressing that opinion, Curlee waived error concerning such qualification and Smejkal’s

testimony alone was sufficient evidence of the fact that the playground was open to the public.

This Court has recognized that a lay witness may occasionally give what may otherwise appear to be a conclusory opinion, as a sort of shorthand rendition based on his firsthand observation of some scene or event combined with his particular training and experience. *See Fairow v. State*, 943 S.W.2d 895, 898-99 (Tex. Crim. App. 1997); *see also Ex parte Nailor*, 149 S.W.3d 125, 134 n.41 (Tex. Crim. App. 2004) (citing *Fairow* and other opinions allowing police officer lay opinion testimony concerning the officer's perception of a particular scene or event).

In addition, this Court has also recognized that, in conjunction with a sufficiency review, a party may forfeit his complaint concerning the competency of opinion testimony of a similar nature. *See Moff v. State*, 131 S.W.3d 485, 491 (Tex. Crim. App. 2004) (competency of evidence was forfeited by a lack of objection to the manner in which market value of stolen items was shown).

In the present case, had Curlee believed that Officer Smejkal lacked qualification to express an opinion that the playground was open to the public, he should have objected to that opinion at trial, where the basis for Smejkal's opinion could have been further explored. Absent such an objection, the opinion

should be given probative value as evidence that the playground truly was open to the public.

#### **IV. Conclusion.**

Accordingly, the State presented legally sufficient evidence to prove that the playground in question was open to the public, and thus that the drug free zone enhancement applied.

#### **PRAYER FOR RELIEF**

For the foregoing reasons, the State requests that this Court affirm the judgment of the Thirteenth Court of Appeals.

Respectfully submitted,

/s/ *Douglas K. Norman*

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Douglas K. Norman  
State Bar No. 15078900  
Special Prosecutor  
Jackson County District Attorney  
115 W. Main Street, Ste 205  
Edna, Texas 77957  
(361) 782-7170  
douglas.norman@nuecesco.com

Attorney for Appellee

### **RULE 9.4 (i) CERTIFICATION**

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3), I certify that the number of words in this brief, excluding those matters listed in Rule 9.4(i)(1), is 2,844.

/s/ *Douglas K. Norman*

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Douglas K. Norman

## **CERTIFICATE OF SERVICE**

This is to certify that, pursuant to Tex. R. App. P. 6.3 (a), copies of this brief were e-served on November 16, 2020, on Appellant's attorney, Mr. Luis A. Martinez, at Lamvictoriacounty@gmail.com, and on the State Prosecuting Attorney, at Stacey.Soule@SPA.texas.gov..

*/s/ Douglas K. Norman*

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Douglas K. Norman

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Douglas Norman  
Bar No. 15078900  
douglas.norman@nuecesco.com  
Envelope ID: 48109145  
Status as of 11/17/2020 9:38 AM CST

#### Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Stacey Soule	24031632	information@spa.texas.gov	11/16/2020 9:19:17 AM	SENT
Stacey Soule		stacey.soule@spa.texas.gov	11/16/2020 9:19:17 AM	SENT

Associated Case Party: DallasShaneCurlee

Name	BarNumber	Email	TimestampSubmitted	Status
Luis Adrian Martinez	24010213	lamvictoriacounty@gmail.com	11/16/2020 9:19:17 AM	SENT